No. 77-1779

In the Supreme Court of the United States

OCTOBER TERM, 1978

AUGUSTINE PARIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 578 F.2d 1371 (table).

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1978. On May 15, 1978, Mr. Justice Marshall granted an extension of time to file a petition for certiorari to and including June 17, 1978. The petition for a writ of certiorari was filed on June 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions about withdrawal from the conspiracy were proper.

2. Whether preindictment delay violated petitioner's due process rights.

3. Whether the joinder of tax-evasion and narcotics charges was proper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of federal income tax evasion, in violation of 26 U.S.C. 7201, and one count of conspiracy to import and distribute heroin, in violation of 21 U.S.C. (1964 ed.) 173, 174 and 21 U.S.C. 846 and 963. Petitioner was sentenced to concurrent terms of two and one-half years' imprisonment on each of the tax evasion counts and ten years' imprisonment on the conspiracy count. In addition, petitioner was fined $5,000 on each tax-evasion count and $15,000 on the conspiracy count. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial showed that from February 1970 through June 1972 petitioner conspired with Richard Busby, William Hamman, James Wilson, and Merle Mjelde to import heroin from Hong Kong, and to distribute the heroin in New York. In February 1970, Wilson asked Hamman to find a buyer for heroin (Tr. 435-436).[1] Hamman then

[1] "Tr." designates the trial transcript.

contacted Busby, who told him that petitioner could buy as much heroin as Wilson could supply (Tr. 436-437). Hamman, in turn, contacted Wilson and told him to begin smuggling heroin into the United States (Tr. 436-437). Six shipments of heroin followed.

In May 1970, Wilson delivered the first shipment (100 ounces of pure heroin) to Hamman, who, in turn, delivered the heroin to Busby. Busby sold the shipment to petitioner, who told him that he wanted larger shipments in the future (Tr. 437-442, 498). In February 1971, Hamman and Wilson bought 50 ounces of heroin in Hong Kong (Tr. 443-448). Hamman stored this second shipment until it could be combined with a third shipment of 150 ounces in March 1971 (Tr. 449-457). Hamman and Busby hired Mjelde to deliver the second and third shipments to petitioner in New York (Tr. 452-459, 651-665). In March 1971, Wilson obtained a fourth shipment of 200 ounces of heroin, which he combined with a fifth shipment of 375 ounces (Tr. 463-466). Hamman and Busby again instructed Mjelde to deliver the combined shipments to petitioner (Tr. 466-478), who paid Mjelde $45,000 (Tr. 672-681).

There were no additional heroin shipments from Hong Kong between April 1971 and June 1972. As a result of continued pressure by Busby to arrange further shipments, Hamman arranged with Wilson in June 1972 to obtain 250 ounces of heroin (Tr. 478-483, 546). This last smuggling effort failed when Wilson was arrested while in possession of the

heroin (Tr. 553-558).[2] Wilson then agreed to cooperate with customs agents in a controlled delivery to his co-conspirators (Tr. 559-563). Wilson subsequently met with Hamman, who told him to leave the heroin in the trunk of a car parked in a particular garage (Tr. 481-484). Pursuant to the instructions of customs agents, Wilson put sugar, not heroin, in the car trunk (Tr. 565-567). Busby asked his girlfriend, Lenze, to pick up the car and to drive it to her home, which she did (Tr. 598-599). The next day customs agents arrested Hamman and Lenze; they found a slip of paper with petitioner's home telephone number in Lenze's pocketbook (Tr. 583, 602-603, 613), which ultimately led to petitioner's arrest after continued investigation.

While petitioner was receiving heroin from Wilson, he expended from taxable sources at least $75,807 in 1970 and $204,404 in 1971. He reported taxable income of only $23,651 in 1970 and $31,376 in 1971. Thus, petitioner failed to report taxable income of $43,896 in 1970 and $159,373 in 1971. Accordingly, the government's evidence showed that petitioner evaded at least $11,794 of federal income taxes in 1970 and $76,330 of taxes in 1971 (Tr. 889-961).

At trial, petitioner testified that he had never engaged in the narcotics business (Tr. 959-961). He claimed that the money for his large cash expenditures was derived, in part, from gambling winnings, which he did not know were reportable income (Tr.

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[2] This shipment of heroin had a street value of $6 million (Tr. 578).

1007-1009, 1080-1081), and that in 1970 he found $47,000 in cash while cleaning his attic (Tr. 943-945).

ARGUMENT

1. Petitioner contends (Pet. 6) that the trial court's instructions were improper because they indicated that "the sole method of withdrawal from a conspiracy is by a public airing shown to have been received by each co-conspirator and understood by each."

This claim is without foundation. As petitioner concedes (Pet. 7), the district court instructed the jury, in accordance with this Court's decision in *Hyde* v. *United States*, 225 U.S. 347 368-370 (1912), in the following terms (Tr. 1253):

> A conspiracy, once formed, is presumed to have continued until its objectives are accomplished or there is an affirmative act of termination by its members.
>
> So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until its termination, unless there is affirmative proof offered of withdrawal or disassociation.
>
> You don't get out of a conspiracy simply by not doing anything for a while. The defendant contends that even if you find beyond a reasonable doubt that a conspiracy existed in February of 1970 to June of 1972, that he may have affirmatively withdrawn from the conspiracy prior to April 11, 1972. Unless the defendant produces affirmative evidence of his withdrawal from the

> conspiracy, the conspiracy is presumed to continue until the last overt act by any of the conspirators—such as making a clean breast of his involvement with the charges, or an indication of abandonment to the other co-conspirators, reasonably calculated to reach their knowledge, and the burden of proving this withdrawal from the conspiracy is on the defendant, once they have proved that he was in the conspiracy—a matter for you to decide.

Petitioner's reliance upon *United States* v. *United States Gypsum Co.*, 550 F.2d 115 (3d Cir. 1977), affirmed, No. 76-1560 (June 29, 1978), is therefore misplaced. In that case this Court found that an instruction that required the defendant to prove notification "to each other member of the conspiracy" to the effect that "he will no longer participate in the undertaking so they understand they can no longer expect his participation" was too "circumscribed" because it limited the possibility of withdrawal to "impractical" methods (slip op. 39). Here, however, the district court used no such rigid language, stating only that petitioner had to establish withdrawal by "affirmative evidence" and noting that "making a clean breast of his involvement * * * or an indication of abandonment to the other co-conspirators, reasonably calculated to reach their knowledge" establishes withdrawal.[3]

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[3] We would also point out that petitioner asserted a defense of non-involvement and did not offer any evidence of withdrawal. He thus failed to establish withdrawal from the conspiracy under any standard.

Nor is there any reason for this Court to reexamine its decision in *Hyde*, as petitioner urges (Pet. 7). The doctrine that a defendant has the burden of proving affirmative action to withdraw from the conspiracy has been followed consistently. See, *e.g.*, *United States* v. *Mardian*, 546 F.2d 973, 978 n. 5 (D.C. Cir. 1976); *United States* v. *Bastone*, 526 F.2d 971, 987-988 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976). Indeed, this Court relied upon the *Hyde* doctrine in *United States* v. *United States Gypsum Co.*, *supra*, slip op. 40.[4]

2. Petitioner claims (Pet. 8) that the 52 month delay between the time the government had grounds to charge him with conspiracy and the time of his indictment deprived him of due process. This claim is likewise without foundation.

In *United States* v. *Lovasco*, 431 U.S. 783 (1977), this Court held that in order to establish a violation of due process based on pre-indictment delay, a de-

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[4] Petitioner's claim (Pet. 5-6) that the government did not establish his involvement in the conspiracy after 1971 is likewise without merit. Petitioner, not the government, has the burden of establishing his withdrawal from the conspiracy. Moreover, the government's evidence showed that petitioner continued to engage in the conspiracy. The June 1972 aborted delivery strongly suggested that petitioner again was acting as the New York connection for his former co-conspirators. Throughout the conspiracy, Busby continually referred to petitioner as the "New York connection". There was no suggestion that, aside from petitioner, Busby knew any other bulk purchaser of heroin. Most significantly, petitioner's home telephone number was found in the pocketbook of Busby's girlfriend when she picked up the heroin shipment in June 1972.

fendant must demonstrate not only that the delay violates "fundamental conceptions of justice" and offends "the community's sense of fair play and decency," but also that he has suffered actual "prejudice" as a result of the delay. *Id.* at 790. The court below properly found that petitioner had established neither element (Pet. App. 2a).

Petitioner raised the pre-indictment delay issue for the first time during trial (Tr. 912). At the request of the court, the government submitted post-trial affidavits[5] that, together with the evidence elicited at trial, established that the delay was due to the government's continuing investigation of petitioner.

In late 1972, after Hamman, Busby, Wilson, and Lenze were arrested in Seattle, the United States Attorney's Office in Seattle determined that the evidence against petitioner was insufficient to justify immediate prosecution. The government therefore decided to continue its investigation. In January 1973, customs inspectors found in petitioner's possession, as he returned to the United States from Europe, approximately $36,000 in cash that he failed to report as required by 31 U.S.C. 1101. As a result, the IRS began an investigation independent of the Seattle narcotics investigation. Later the IRS learned of petitioner's connection to the Seattle-based narcotics case, and it thereafter obtained additional information from the DEA. Petitioner's suspected nar-

[5] The four affidavits were from two DEA agents, an IRS agent, and the Assistant United States Attorney who prosecuted the case.

cotics smuggling established a likely source of income in the tax years under investigation. IRS agents continued to investigate petitioner's many expenditures and sources of income until the trial began.

In June 1975, DEA agents in New York were alerted by an informant that petitioner had been part of a narcotics importation scheme involving up to 25 kilograms of heroin per month, and they began a third investigation of petitioner. The informant's information led to additional evidence against petitioner. In July 1975, the IRS's Regional Counsel submitted a report to the Department of Justice recommending prosecution. In September 1975, a Staff Attorney with the Department of Justice prepared a report recommending prosecution, which was forwarded to the United States Attorney's Office for the Southern District of New York in early 1976. The results of the Seattle and the New York DEA investigations and the IRS investigation were part of the Department of Justice's analysis, and each contributed to the decision to indict petitioner in April 1977 on narcotics and tax evasion charges.

The district court found that, while the government may have had a *prima facie* case against petitioner in the Seattle case by 1972, it was "a rather weak one which probably would not have resulted in conviction." The court therefore concluded that further investigation was necessary and "did not violate 'fundamental conceptions of justice' . . ." (Appendix on Appeal 8a). The court of appeals correctly determined (Pet. App. 2a) that under these circumstances the delay was necessary to complete the gov-

ernment's investigation and was not for an improper purpose. Accord, *United States* v. *King*, 560 F. 2d 122, 129-130 (2d Cir.), cert. denied, 434 U.S. 925 (1977); *United States* v. *Matlock*, 558 F. 2d 1328, 1330 (8th Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Shaw*, 555 F. 2d 1295, 1299 (5th Cir. 1977). As this Court indicated in *United States* v. *Lovasco*, *supra*, 431 U.S. at 791-795, delay necessary to complete a valid investigation is not only proper but also is to be encouraged, because the government should, from the standpoint both of the public interest and of potential defendants, seek to avoid premature initiation of prosecutions.

In addition, the courts below correctly found that petitioner failed to establish any prejudice from the delay. Petitioner's vague assertion (Pet. 8) that as a result of the delay he "lost testimony of business associates who might have been able to testify" in his behalf is purely speculative. It is well-settled that such general claims are insufficient to establish prejudice. See, *e.g.*, *United States* v. *King*, *supra*, 560 F. 2d at 130-131; *United States* v. *Foddrell*, 523 F. 2d 86, 87-88 (2d Cir.), cert. denied, 423 U.S. 950 (1975); *United States* v. *Jackson*, 504 F. 2d 337, 338 (8th Cir. 1974), cert. denied, 420 U.S. 964 (1975). Petitioner's claim (Pet. 8-9) that at an earlier trial a government witness "might" have testified to a more exact date for his drug sale to petitioner, and that petitioner may have been able to prove he was in Europe at the time of the sale, fails for the same reason.

3. Petitioner also argues (Pet. 10) that he was prejudiced by an improper joinder of the tax-evasion counts with the narcotics conspiracy count.

The court below correctly held (Pet. App. 2a) that petitioner's failure either to object to the joinder or to move for severance of the counts resulted in a waiver of any claim of improper joinder. See *United States* v. *Green*, 561 F. 2d 423, 426 (2d Cir. 1977); *United States* v. *Goldberg*, 527 F. 2d 165, 173 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Quinones*, 516 F. 2d 1309, 1312 (1st Cir.), cert. denied, 423 U.S. 852 (1975).

In any event, because the offenses charged in the indictments arose out of the same criminal acts and transactions and proof at separate trials would have overlapped, it is clear that joinder was proper. See Fed. R. Crim. P. 8(a), 14; see also *United States* v. *McGrath*, 558 F. 2d 1102, 1106 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); *United States* v. *Roselli*, 432 F. 2d 879, 898-902 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). Evidence of narcotics purchases would have been admissible at a separate trial of the tax offenses to prove both a likely source of income and specific expenditures. See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121, 137-138 (1954). Similarly, evidence of petitioner's expenditures of cash substantially in excess of his reported income would have been admissible at a separate trial of the narcotics charge as circumstantial proof of the profits of his criminal venture. See, *e.g.*, *United States* v. *Tramunti*, 513 F. 2d 1087, 1105 (2d Cir.), cert.

denied, 423 U.S. 832 (1975); *United States* v. *Schwartz*, 535 F. 2d 160, 165 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States* v. *Kenny*, 462 F. 2d 1205, 1219 (3d Cir.), cert. denied, 409 U.S. 914 (1972). Accordingly, joinder of the tax evasion and narcotics charges was entirely proper.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* Petitioner argues (Pet. 9-10) that the joinder prejudiced him because it permitted the prosecutor to engage in bad-faith questioning of a defense witness, Dr. Hewlett, who testified, in regard to the tax-evasion charges, that he loaned petitioner $5,000 (see Tr. 345-347). The prosecutor's questions about Hewlett's involvement in the narcotics scheme were not improper and could equally have occurred at a separate trial on the tax-evasion charges. See Fed. R. Evid. 607; *United States* v. *Kerr*, 464 F.2d 1367, 1372 (6th Cir. 1972). Clearly, in a separate trial on the tax evasion charges, the district court would have had discretion to permit impeachment of Hewlett during cross-examination through inquiry into his involvement with petitioner in the narcotics scheme.

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